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No. 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GROUP W CABLE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
AND COX CABLEVISION CORPORATION,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I. The Pole Attachment Act Is Routine Rate Regulation And Not A Taking of Property

The utility companies devote considerable energy to establishing that privately-owned public utilities are entitled to the protections of the Takings Clause of the Fifth Amendment.[1] That question, however, is not at issue. The cable operators in no way dispute that privately-owned public utilities are protected against

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[1] *See* Fla. Power Br. at 21-28; Tampa Elec. Br. at 20-27; Ala. Power Br. at 10 n.7.

uncompensated takings of their private property.[2] The question is whether regulation of the rates that utilities may charge for leasing space on the poles they use to provide electric or telephone service is necessarily a taking for which compensation must be paid.[3]

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[2] *See* Group W Br. at 22 n.51.

[3] The cases cited by the utility companies support the undisputed general proposition that the Takings Clause extends to utility property, but do not support the claim that a taking occurred in this case. The issue in *Western Union Telegraph Co.* v. *Pennsylvania Railroad*, 195 U.S. 540 (1904), for example, was not even whether a taking had occurred, but whether an Act of Congress granted telegraph companies the power of eminent domain. *See id.* at 559. The Court held that the Act did not, because it contained no provision for "reasonable compensation" upon the exercise of the asserted eminent domain power. *Id.* at 570. Here there is no question of eminent domain power, since the Pole Attachment Act only applies to utilities that have voluntarily chosen to lease pole space to cable operators. In addition, the Pole Attachment Act, unlike the Act at issue in *Western Union*, assures that the utilities receive "just and reasonable" rates for the attachments they permit. 47 U.S.C. § 224(b)(1).

Cases cited by the utility companies finding a taking when government sought to usurp the managerial prerogatives of a utility by forcing it to engage in new businesses or provide new services, *see, e.g.*, Fla. Power Br. at 24, are not on point. Nothing in the Pole Attachment Act requires utilities to lease space to cable operators. Other cases finding a taking because a utility was compelled to provide a service "at a loss or without substantial compensation," *Northern Pacific Ry.* v. *North Dakota*, 236 U.S. 585, 599 (1915), or indeed with *no* compensation, *Missouri Pacific Ry.* v. *Nebraska*, 217 U.S. 196, 205 (1910), are also inapposite. Utilities that do choose to provide pole attachments receive reimbursement equal to fully-allocated costs, including a reasonable rate of return.

At least since *Munn* v. *Illinois*, 94 U.S. 113, 126-132 (1877), this Court has recognized that such rate regulation is not a taking, so long as the regulated utility is permitted to receive a nonconfiscatory rate of return. The utility companies do not allege that the rates they are authorized to charge for leasing space to cable operators are confiscatory. Those rates ensure recovery by the utility of not only all operating expenses and capital costs associated with the leasing of space to cable operators, but also a reasonable rate of return.[4] Contrary to the utility companies' contentions, this case "fits more into the regulatory rather than the taking mode as those terms have traditionally been applied by American courts." *Metropolitan Transportation Authority* v. *ICC*, 792 F.2d 287, 297 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3185 (U.S. Sept. 2, 1986) (No. 86-409).[5]

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[4] *See* Group W. Br. at 9-10.

[5] The court in *Metropolitan Transportation Authority* held that no taking occurred on facts far more compelling than those of the present case. That case concerned provisions of the Rail Passenger Service Act, 45 U.S.C. § 562, that *require* private railroads to permit Amtrak to use their tracks and facilities, with compensation set by the ICC and generally limited to incremental or avoidable costs. *See* 792 F.2d at 290-291. The court held that it was not a taking to "requir[e] one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, in order to deliver service to the public." *Id.* at 297. Assuming arguendo that a taking had occurred, the court further held that an award of avoidable costs set by the ICC constituted just compensation. *Id.* In the present case, nothing in the Pole Attachment Act requires a utility to grant pole attachment rights to cable operators, and utilities that choose to do so receive not simply avoidable costs but fully-allocated costs. *See id.* at 291 (contrasting avoidable and fully-allocated costs).

The utilities argue that the leasing of space on the poles they have erected in public rights of way to provide electrical service "does not involve services provided by Florida Power in its public utility capacity."[6] The only reason that the utilities have space on poles to lease, however, is because as public utilities they were granted access to public rights of way and the power of eminent domain. Like other public utilities, Florida Power received these special privileges because it pledged that such property will be used to promote the general public welfare. The Pole Attachment Act seeks to promote the public welfare through widespread availability of reasonably priced cable television service by ensuring that pole attachment charges are not excessive. The utility companies' suggestion that they are immune from such regulation is nothing short of a repudiation of the obligations they accepted when authorized to erect their poles.[7]

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[6] Fla. Power Br. at 24; *see* Tampa Elec. Br. at 21-22.

[7] Florida Power cites a number of state court and utility commission decisions concluding that pole attachments do not fall within the state utility commission's regulatory jurisdiction. Fla. Power Br. at 24-25 & n.19. As statutory interpretations, these decisions merely demonstrate that some state legislatures have not yet chosen to regulate pole attachments, without considering whether a government *could* so regulate if it desired. In fact, a number of states *do* regulate pole attachments as public utility services. *See, e.g., General Telephone Co.* v. *PSC*, 63 A.D.2d 93, 406 N.Y.S.2d 909 (1978); *Kentucky CATV Ass'n* v. *Volz*, 675 S.W.2d 393 (Ky. Ct. App. 1983), *review denied* (Ky. 1984); *Las Cruces TV Cable* v. *New Mexico Corp. Comm'n*, 102 N.M. 720, 699 P.2d 1072 (1985). In addition, the holding in *International Cable T.V. Corp.* v. *All Metal Fabricators, Inc.*, 66 Pub. Util. Rep. 3d (PUR) 446 (Cal. Pub. Util. Comm'n 1966), that pole

Contrary to the suggestion of Tampa Electric,[8] the poles used in the provision of utility service are distinguishable for takings purposes from other utility property, such as an office building.[9] Unlike an office building, utility poles enjoy a special status *because* they are utility property. Utility poles are located in public rights of way or on private property through the exercise of eminent domain. As a direct consequence of this special status, utility poles represent a monopoly gateway for the distribution of communications and electric power cables within a community. That monopoly was not intended to be exploited as a gateway, but was granted to ensure the efficient delivery of telephone and electric service. The use of utility poles, therefore, is subject to regulation to an extent that may or may not be true with respect to other utility property.[10]

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attachments were outside the jurisdiction of the California Public Utility Commission, has since been overruled by the California legislature. *See* Cal. Pub. Util. Code § 767.5(b) (Deering Supp. 1986) (finding that California utilities have dedicated their poles to the provision of cable television pole attachments).

[8] *See* Tampa Elec. Br. at 23.

[9] *See* Group W Br. at 22 n.51.

[10] The three state court decisions cited by Florida Power for the proposition that space on utility poles is private property have nothing to do with the facts of this case. In all those cases, municipalities sought to use poles for city services, with *no* reimbursement to the pole owner. In *New York Telephone Co.* v. *Town of North Hempstead*, 41 N.Y.2d 691, 395 N.Y.S.2d 143, 363 N.E.2d 694 (1977), the city simply attached its street lights to the utility's poles. In *Wisconsin Telephone Co.* v. *City of Sheboygan*, 111 Wis. 23, 86 N.W. 657 (1901), the city asserted the right to attach fire alarm boxes, again with no reimbursement whatsoever to the pole owner. And in *Burlington Light*

In any event, Congress has determined that the public interest is implicated in the rates utilities charge for leasing space to cable operators. *See* S. Rep. No. 580, 95th Cong., 1st Sess. 18 (1977). Quite apart from the electric companies' status as regulated utilities, this determination clearly suffices to support rate regulation.

In this regard the Pole Attachment Act is indistinguishable from typical rent control, which has long been upheld by this Court. *See Block* v. *Hirsh*, 256 U.S. 135 (1921); *Bowles* v. *Willingham*, 321 U.S. 503 (1944). In the case of rent control, a legislative body determines that the public interest is affected by rents being charged, and authorizes regulation of those rents. Under rent control, the tenant physically occupies the premises at rates lower than those the landlord would otherwise charge. Yet this has never been considered an unconstitutional taking, so long as the landlord receives a nonconfiscatory return. As Justice Holmes noted for the Court in *Block* v. *Hirsh*, 256 U.S. at 157, "if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn* v. *Illinois*."

The Act at issue in this case is not simply "like" rent control; it *is* rent control. Congress has determined that the rents being charged to cable operators for leasing space on utility poles affect the public

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& Power Co. v. *City of Burlington*, 93 Vt. 27, 106 A. 513 (1918), the city claimed the right to string the wires of its municipally-owned power company on a competitor's poles -- for free. In the present case, of course, the Pole Attachment Act grants no right of access to poles, and certainly does not grant access free of charge.

interest, and has undertaken regulation of those rents. A holding that such regulation is a taking would call into question not only this Court's precedents upholding rent control, but the constitutional validity of the numerous rent control statutes enacted across the country on the basis of those precedents.[11] Nothing in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), compels such a result; indeed, the Court in that case specifically noted that its holding was in no way meant to undermine rent control. *Id.* at 440. Ignoring this caveat by extending *Loretto* to the present case would thus have consequences far beyond the cable industry.

The utilities' complaint in this case is simply that they are subject to regulation and cannot charge rents as high as they could in the absence of regulation. The logic of their position would require a finding of a taking *no matter what rate was set by the FCC*, unless the rate were that which the utilities could exact in an unregulated market. Their position is thus tantamount to an assertion that regulation of pole attachment rates is completely beyond the jurisdiction of Congress, unless Congress provides compensation for *any* diminution in value caused by regulation.

It has long been recognized, however, that mere diminution in value caused by regulation does not constitute a taking. *See, e.g.*, *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 131 (1978); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962); *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319

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[11] *See, e.g.*, Conn. Gen. Stat. Ann. § 7-148d (West 1986); Mass. Ann. Spec. Laws chs. 57 & 59 (Michie/Law. Co-op. 1979); N.Y. Unconsol. Laws §§ 8581 *et seq.* (McKinney 1974 & Supp. 1986).

(1932). In particular, the Court has recognized that rent control, "the same as other forms of regulation, may reduce the value of the property regulated. But * * * that does not mean that the regulation is unconstitutional." *Bowles* v. *Willingham*, 321 U.S. at 517. This is peculiarly true where, as here, the value allegedly diminished by regulation reflected monopoly profits. It is even truer when the diminution allegedly suffered by the utility is covered by an adjustment of the rates charged to utility users, to ensure that the regulated utility continues to receive its constitutionally-mandated adequate rate of return.[12]

The argument of the utilities that the ratepayers are being required to subsidize the cable operators turns the facts on their head.[13] It is the cable operators who subsidize the ratepayers, not vice versa. If there were no pole attachments by cable operators, the utilities and their ratepayers would be compelled to bear the entire cost of erecting and maintaining the poles. Under the Act, cable operators relieve the ratepayers of a portion of the cost of the poles, including a return on investment.[14]

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[12] *See* Group W Br. at 23.

[13] *See* Fla. Power Br. at 28; Tampa Elec. Br. at 26; Ala. Power Br. at 14.

[14] Congress is of course free to regulate the extent to which cable operators offset costs that would otherwise be borne by ratepayers. *See, e.g., Connolly* v. *Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1025 (1986) ("In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. * * * Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of

II. The Present Case Is Distinguishable From *Loretto*

In light of the foregoing, the utilities are compelled to attempt to bring the normal rate regulation to which they object within the "very narrow" holding of *Loretto*, 458 U.S. at 441. Accepting the utilities' claim would permit the limited exception of *Loretto* to swallow the usual rules of takings jurisprudence, and call into question long-accepted regulation.

Since the activity regulated in this case is the charging of rents in a lease agreement, there is necessarily an element of "physical occupation." In any case involving a lease, that is precisely what the lessee pays for -- the right to occupy space owned by the lessor. The fact that an aspect of physical occupation is involved, however, does not compel a conclusion that a taking has occurred under *Loretto*. That case does not, as the utility companies suggest, stand for the proposition that a taking occurs whenever the government regulates dealings that involve physical occupation. Such a reading of *Loretto* would mean that any rent control is automatically a taking, since rent control involves physical occupation below rates the landlord would charge in an unregulated market. It would mean that commonplace regulation by the ICC of compensation for trackage rights is necessarily a taking, since the exercise of such rights involves physical occupation and use of another's tracks. *See supra* n.5. It would also require a rethinking of well-established precedents such as *Munn* v. *Illinois*, *supra*, since that case upheld regulation of the rates

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another"). In any event, it is difficult to discern how regulation by Congress of the subsidy from cable operators to utility *ratepayers* can give rise to a takings claim by the utility *companies*.

that may be charged for physically occupying the facility at issue, a grain elevator. And it would require rethinking more recent precedents, such as *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), since that case upheld provisions in state law authorizing activity that involved physical intrusions on private property. As the Court noted in *PruneYard*, "the fact that [appellees] may have 'physically invaded' appellants' property cannot be viewed as determinative." *Id.* at 84.

In fact, the present case is quite unlike *Loretto*. The statute at issue in *Loretto* forced building owners to accept the attachments involved in that case. In an effort to fit this case within the holding of *Loretto*, the utility companies misread the Pole Attachment Act to require utilities to lease space on their poles to cable operators.[15] By its terms, however, the Act applies only to utilities that have chosen to lease pole space "for wire communication." 47 U.S.C. § 224(a)(1). The Act "does not vest within a [cable] system operator a right to access to a utility pole, nor does the [Act] require a power company to dedicate a portion of its pole plant to communications use." S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977). The FCC has recognized that the Act "does not guarantee cable operators a right of access to a utility's poles." *Bailey* v. *Mississippi Power & Light Co.*, File No. PA-83-0026, FCC Mimeo No. 36118 (Sept. 11, 1985), at ¶ 8.[16]

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[15] Fla. Power Br. at 16-21; Tampa Elec. Br. at 8, 16-19; Ala. Power Br. at 10-13.

[16] *Bailey* -- the only authority cited by the utility companies -- does not support their contention that the Act requires utilities

In short, the attachments at issue in this case -- in contrast to those in *Loretto* -- were authorized not by the government but by the utility companies themselves, in contracts with the cable operators. Congress has chosen to regulate the rates that may be set in such contracts, but, as this Court noted just last Term, "[i]f the regulatory statute is otherwise within the powers of Congress * * * its application may not be defeated by private contractual provisions." *Connolly* v. *Pension Benefit Guaranty Corp.*, 106 S. Ct. at 1025; *see Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170, 198 (1921) (rent control statute upheld against claim that it impairs obligation of contracts).

Again, the analogy to rent control is compelling. In *Bowles* v. *Willingham*, 321 U.S. at 517, this Court rejected a takings challenge to rent control, noting that nothing in the rent control statute required owners to devote their property to the rental market:

> We are not dealing here with a situation which invokes a "taking" of property. * * * By § 4(d) of the Act it is provided that "nothing in this Act shall be construed to require any person * * * to offer any accomodations for rent." There is no requirement that the apartments in question be used for purposes which bring them under the Act.

So too here, there is nothing in the Pole Attachment Act that requires utility companies to lease space on

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to grant access to their poles to cable operators. That case involved a utility that had already voluntarily chosen to lease space on its poles to cable operators, *see Bailey*, *supra*, at ¶¶ 3, 8, 9, and, as noted, the FCC in its decision expressly stated that the Act does not grant a right of access.

their poles for cable purposes. The legislative history expressly disavows any right of access, and the agency charged with administering the Act has held that no such right exists. *Bowles*, not *Loretto*, is controlling.

The utility companies also contend that there is a taking in the present case under *Loretto* because the regulated attachments cannot be terminated.[17] The utilities, however, have never attempted to exclude the cable operators from their poles, for the simple reason that it is the rate, not the attachment itself, to which they object. Although the utilities assert that it would be "futile" to attempt to exclude the cable operators,[18] that claim is premature and, on this record, entirely speculative. It should await a case in which a *legitimate* attempt is made to oust cable operators from the space they occupy, and the FCC blocks that attempt. The only authority the utilities cite for this "futility" argument are two cases in which the FCC determined that utiiities were retaliating against cable operators because the latter exercised their rights under the law. In *Whitney Cablevision* v. *Southern Indiana Gas & Electric Co.*, File No. PA-84-0017, FCC Mimeo No. 841 (Nov. 16, 1984), the utility sought to terminate the contract immediately after the cable operator requested information to determine if the pole attachment rate it was paying complied with Commission rules. *Id.* at ¶ 3. In *Tele-Communications, Inc.* v. *South Carolina Electric & Gas Co.*, File No. PA-83-0027, FCC Mimeo No. 3994 (April 19, 1985), the Commission determined

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[17] *See* Fla. Power Br. at 16-21; Tampa Elec. Br. at 16-18; Ala. Power Br. at 10-11.

[18] Fla. Power Br. at 19 n.15; Ala. Power Br. at 11 n.8.

that the utility's "sudden decision to terminate the agreement was in response to [the cable operator's] announced intention to file a rate complaint." *Id.* at ¶ 7.

Permitting utilities to punish cable operators whenever the latter exercise their rights under the Act would, of course, be tantamount to repealing the Act. The utilities could threaten to terminate agreements unless the cable operators agreed to pay pre-regulation rates. Preventing retaliatory evictions in no way transforms the leases into permanent occupations, any more than preventing landlords from evicting tenants for exercising rights under rent control statutes or housing codes effects a permanent occupation and renders the rent control a taking. Rent control statutes typically contain retaliatory eviction provisions,[19] and such provisions have been consistently upheld against takings challenges. *See, e.g., Flynn* v. *City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981); *Grace* v. *Town of Brookline*, 379 Mass. 43, 399 N.E.2d 1038 (1979); *cf. Nash* v. *City of Santa Monica*, 37 Cal. 3d. 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984), *appeal dismissed*, 470 U.S. 1046 (1985). The first rent control statute to reach this Court contained eviction protections, and the Court upheld them, noting that "[i]f the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail." *Block* v. *Hirsh*, 256 U.S. at 157-158. Here the cable operators remain fully subject to the utility companies' power to evict, so long as that power is not exercised solely to avoid

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[19] *See, e.g.*, Conn. Gen. Stat. Ann. §§ 7-148d(b), 47a-20 (West 1986); Mass. Ann. Spec. Laws ch. 57, § 9; ch. 59 (Michie/Law. Co-op. 1979); N.Y. Unconsol. Laws § 8585 (McKinney 1974 & Supp. 1986).

rent control and frustrate Congress's "attempt to limit the landlord's demands." As the FCC has recognized, preventing retaliatory evictions "does not mean * * * that a contract right to terminate cannot be exercised for good cause * * *." *Tele-Communications, Inc.* v. *South Carolina Electric & Gas Co.*, *supra*, at ¶ 8.

III. The Rates Permitted Under the Act Exceed the Appropriate Measure of Just Compensation

Even if this Court were to determine that regulation of the rates that may be charged for leasing space on the poles constituted a taking, it is clear that the rates set by the FCC, subject to judicial review, constitute more than adequate just compensation. The utility companies contend that fair market value is the measure of just compensation, suggesting that they are therefore entitled to receive the same rents they would have received in the absence of regulation.[20] As the Court emphasized in *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 512 (1979), however, it "has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate." *See United States* v. *Cors*, 337 U.S. 325, 332 (1949) (Court "has refused to make a fetish even of market value, since that may not be the best measure of value in some cases"). One such situation is where no fair market exists, when the Court cannot determine what a willing buyer would pay to a willing seller because the market is distorted.

In the leading case of *United States* v. *Cors*, *supra*, this Court considered whether the owner of a boat

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[20] *See* Fla. Power Br. at 32-36; Tampa Elec. Br. at 31; Ala. Power Br. at 18-19.

requisitioned by the War Shipping Administration in 1942 was entitled to market value compensation when that value was inflated by the urgent need for ships. The Court held that in that case market value "does not reflect what 'a willing buyer would pay in cash to a willing seller,' in a fair market. * * * That is a hold-up value, not a fair market value." *Id.* at 333-334 (quoting *United States* v. *Miller*, 317 U.S. 369, 374 (1943)).

Congress has determined that the rents set by the utilities prior to regulation reflected "a hold-up value." The pre-regulation rates were based on the fact that, for cable operators, utilities were "the only game in town"[21] and that utilities could dictate to "cable operators 'take it or leave it' terms."[22] As the Court recognized in *Cors*, such rates do not reflect "fair market value" and cannot be considered an appropriate measure of just compensation. 337 U.S. at 334.[23] That the utilities could charge more in the absence of regulation does not establish that the compensation they receive for pole attachments is constitutionally inadequate.[24]

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[21] Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 24 (1976) (Rep. Van Deerlin).

[22] 123 Cong. Rec. 16694 (1977) (statement of Rep. Wirth, sponsor of Act).

[23] *See also Lord Mfg. Co.* v. *United States*, 84 F.Supp. 748 (Ct. Cl. 1949) (where market value of goods appropriated for war effort was based on virtual monopoly plus shortages, just compensation was not market value but cost plus 10%), *cert. denied*, 339 U.S. 956 (1950).

[24] The utilities' assumption that the measure of the compen-

The utilities recognize that the goal of the just compensation requirement is to put the owner of property in as good a position as if his property had not been taken.[25] In suggesting that this standard requires a return to pre-regulation rents, however, the utilities adopt a theory of compensation wholly inconsistent with their theory of a taking. They cannot argue that there is a taking in this case simply because rates have been lowered. Rather, they argue that the Act effects a taking because it authorizes a physical occupation. The goal of just compensation, therefore, should be to restore the utilities to the position they would be in if there had been no physical occupation. This would require an award equal to any extra expense incurred by the utilities due to the attachments, so-called "avoidable costs."[26] The Act, however, permits the utilities to receive not only avoidable costs but fully-allocated costs, a greater degree of compensation.[27]

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sation due is the rate they could charge prior to regulation was expressly not embraced by the Court in *Loretto*, 458 U.S. at 441 ("our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken").

[25] *See, e.g.*, Fla. Power Br. at 32.

[26] *See Metropolitan Transportation Authority* v. *ICC*, 792 F.2d at 297 ("assuming arguendo that there has been a taking, compensation is adequate since [the owner], in obtaining avoidable costs, will receive what it would have had but for the taking. * * * In other words, the owner * * * will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation").

[27] Congress, of course, may authorize compensation greater

It is important to recognize that the court below did not rule that the regulated rents were inadequate to satisfy the appropriate standard of just compensation. Rather, the court declined even to consider the adequacy of compensation, because of the role of the FCC in setting the amount of compensation. *See* App. 16a-17a. This Court, however, not only has permitted administrative agencies to play a role in establishing just compensation, subject to judicial review, but has emphasized the benefits of such an approach. In *Thompson* v. *Texas Mexican Railway Co.*, 328 U.S. 134, 147-148 (1946), the Court upheld the authority of the ICC to set rents for trackage rights:

> If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries. * * * [I]t is one of the Commission's high functions to protect the public interest against unfair or oppressive financial practices which in the past led to such great havoc and disaster. That policy would be undermined if the carriers could repair to courts for determination of the conditions under which trackage rights could be secured. Then jury verdicts or settlements would take the place of the expert and informed judgment of the Commission.

The Court noted that "[a]ny legal, including constitutional, rights of [the track owner] are protected by

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than the constitutional minimum. *See United States* v. *50 Acres of Land*, 469 U.S. 24, 30 n.14 (1984).

the review which Congress has granted the orders of the Commission." *Id.* at 150.

Here too Congress has determined that the public interest requires regulation by an expert agency of the rents that utilities charge cable operators. Requiring such questions to be resolved by courts in the first instance would undermine the purposes of the Act. Nor does permitting the FCC to determine the appropriate rents usurp judicial functions, since the FCC determinations are subject to judicial review.[28]

The utilities contend, however, that judicial review is inadequate in this case, because a reviewing court is allegedly limited to the administrative record, and that record is limited by the FCC. Their argument proves too much. Any judicial review of administrative action is limited as a general matter, but that does not mean that the review is constitutionally inadequate. The evidence before the FCC and the reviewing court in every pole attachment case is sufficient to determine whether the utility has received fully-allocated costs -- including an adequate rate of return -- and no more is required to determine just compensation. In any event, if a reviewing court determines that additional evidence is required, that court is always free to remand the case to the agency for development of the necessary factual record. *See FCC* v. *ITT World Communications, Inc.*, 466 U.S.

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[28] *See Metropolitan Transportation Authority* v. *ICC*, 792 F.2d at 296 (rejecting claim that statute at issue in that case "is an unconstitutional condemnation act because an administrative agency rather than a court determines the compensation and because the statute ties the agency's hands in determination of that amount").

463, 469 (1984); *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 593-594 (1980).[29]

The utilities' arguments amount to little more than expressions of dissatisfaction with regulation, because they could charge more without it. Such dissatisfaction, however, has never been considered to rise to the level of a constitutional violation. The utilities receive a fair rent for the use of the space on their poles that they have decided to lease to the cable operators. Under the Fifth Amendment, they are entitled to no more.

CONCLUSION

For the reasons expressed above, and in appellants' main brief, the judgment below should be reversed.

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[29] In *United States* v. *Jones*, 336 U.S. 641 (1949), the Court held that the Court of Claims was without jurisdiction to review Interstate Commerce Commission rate orders, in part because the Court of Claims -- unlike the District Courts -- "has jurisdiction only to render a money judgment against the United States and none to remand to the Commission for further consideration a rate order which it might find confiscatory." *Id.* at 670. The Court stressed that jurisdiction in the District Courts possessed the "outstanding advantage" over jurisdiction in the Court of Claims that the District Courts "have power, on finding a rate order invalid, whether as confiscatory or as not complying with the statute, to remand the cause to the Commission for further proceedings." *Id.* at 671.

Respectfully submitted,

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